A

KERAJAAN NEGERI KELANTAN

v.

PETROLIAM NASIONAL BERHAD & OTHER APPEALS

B

FEDERAL COURT, PUTRAJAYA
ABDULL HAMID EMBONG FCJ
SURIYADI HALIM OMAR FCJ
AHMAD MAAROP FCJ
HASAN LAH FCJ
C ZAINUN ALI FCJ
[CIVIL APPEALS NO: 01(i)-24-10-2012(W);
01(i)-25-10-2012; 01(i)-30-11-2012(W)]
2 JULY 2014

D ***CONTRACT:*** *Breach - Terms and conditions - Agreements between State Government and statutory corporation for exploitation of petroleum offshore State - Failure to pay cash consideration to State - Whether in breach of agreements - Determination of rights of parties - Determination of core issue - Whether could be resolved by interpreting agreements and*
E *relevant legislation - Whether amenable to resolution summarily by affidavit evidence and determining issues of law - Rules of the High Court 1980, O. 14A*

CIVIL PROCEDURE: *Summary application - Rules of the High*
F *Court 1980, O. 14A - Principles - Agreements between State Government and statutory corporation for exploitation of petroleum offshore State - Whether issues pleaded purely issues of law - Whether determinable by determining core question thereof - Whether determination of core question would determine corollary all causes of actions pleaded by plaintiff -*
G *Exercise of discretion by trial judge - Whether unflawed - Whether warranting no intervention - Petroleum Nasional Berhad v. Kerajaan Negeri Terengganu - Whether still good law*

CIVIL PROCEDURE: *Discovery - Discovery of documents - Breach*
H *of contract - Whether documents sought irrelevant to core issue in claim - Whether could not establish issue of liability - Whether discovery application to be delayed pending determination of issues of law - Exercise of discretion thereof - Whether justifiable - Rules of the High Court 1980, O. 14A, O. 24 r. 4*

I

By agreements known as the "Kelantan Petroleum Agreement" and the "Kelantan Grant" executed on 9 May 1975 between the State Government of Kelantan ('plaintiff') and Petroliam Nasional Berhad ('Petronas'), a company conferred with the rights and powers as spelt out in the Petroleum Development Act 1974 ('PDA'), the plaintiff and Petronas agreed that: (i) Petronas would have exclusive, perpetual and irrevocable right to explore for and exploit petroleum lying in the offshore of the State of Kelantan ('Kelantan'); and (ii) Petronas would make cash payments to the plaintiff in the form of a yearly sum amounting to 5% of the value of petroleum won and saved thereof. It was not in dispute that the Kelantan Grant was executed in the form provided by the Schedule to ss. 2 and 4 of the PDA, and indeed represented the 'Vesting Deed' so referred to in the Act. The plaintiff alleged that Petronas has failed to make the cash payments as promised, and in the event, averring breach of contract, unfair discrimination, constitutional breach and estoppel, claimed for specific performance of the agreements. The facts also showed that, pursuant to the suit, the Government of Malaysia, who claimed to have exclusive rights to all petroleum won by Petronas in the continental shelf off the coast of Kelantan, successfully applied for leave to intervene and was named the second defendant in the suit. Be that as it may, on 10 February 2011, the plaintiff served a notice on Petronas to produce documents which they alleged were relevant to their claim and to the issue of Petronas' liability under the agreements. These include the agreements and grants as executed between Petronas and other State Governments under the PDA, documents pertaining to areas of petroleum won and obtained offshore Kelantan, production-sharing agreements as executed by Petronas with contractors in respect of Kelantan's petroleum production areas, documents on the production and payments made between Malaysia and Thailand relating to the Malaysia-Thailand Joint Authority and accounts of royalty payments as was paid by Petronas to the Federal Government in respect of petroleum production areas for the states of Kelantan, Sabah, Sarawak and Terengganu respectively. Petronas did not however oblige, and the plaintiff hence filed an application for discovery of the documents ('discovery application') under O. 24 Rules of the High Court 1980 ('RHC'). In retort, Petronas and the second defendant thereafter by separate applications applied to the High Court for the disputes to be resolved by way of determination of certain questions of law pursuant to O. 14A and/or O. 33 r. 2 of the RHC ('O. 14A applications').

On 7 October 2011, the High Court dismissed the plaintiff's discovery application on the grounds that the documents sought to be disclosed were either not determinative of Petronas's liability under the agreements, not relevant to the core issue of whether the plaintiff was entitled to petroleum won in the continental shelf off the coast of Kelantan, or not in the possession or control of Petronas. The learned judge then went on to hear the O. 14A applications and, on 18 January 2012, allowed the same. It was the view of the learned judge, upon the authority of the Court of Appeal in *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu* ('the *Terengganu* case'), that the determination of the core issue aforesaid could be deduced merely from the construction of documents thereby making a full trial unnecessary. The plaintiff appealed but the appeals were dismissed by the Court of Appeal. The plaintiff applied for and having been granted leave to appeal posed the following questions of law for the determination of the Federal Court, namely: (i) whether, in view of the decisions of the Federal Court in *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd*, *Bato Bagi & Ors v. Kerajaan Negeri Sarawak and Another Appeal* and *Thein Hong Teck & Ors v. Mohd Afrizan Husain and Another Appeal*, the applicable test for an O. 14A application as propounded in the *Terengganu* case still applies; (ii) whether the O. 14A procedure as adopted by the courts below was (in)appropriate; and (iii) whether the courts below were correct in relying on O. 24 rr. 4 and 8 of the RHC when dismissing the discovery application at that stage of the proceeding, and in any case, whether the O. 14A applications should only be determined after the parties had completed discovery of the documents.

Held (dismissing appeals):

Per Abdull Hamid Embong FCJ delivering the judgment of the court:

(1) The Court of Appeal in the *Terengganu* case did not lay down a hard and fast rule on the application of O. 14A. The decision in the *Terengganu* case merely stated some of the relevant factors which should be considered in dealing with an application under O. 14A and they are not meant to be exhaustive. (para 27)

(2) The issues in *Dream Property* and *Thein Hong Teck*, as viewed by the Federal Court, were questions of fact which were seriously disputed between the parties and required to be determined in a full trial, to which the application of

O. 14A was held unsuitable. In *Dream Property*, there was no question of law framed or a specific question on the construction of the agreement forwarded by the plaintiff to the court for consideration. By these decisions, it is clear that the position of the law in an O. 14A application is that, where there were serious disputes of facts involved, it is inappropriate and unsuitable to have recourse to an O. 14A procedure. In contrast, the Court of Appeal in the *Terengganu* case, after scrutinising the pleadings, concluded that the issues raised were purely legal issues based on the construction of documents which are suitable to be determined by the O. 14A procedure. It followed that the facts and circumstances in the three Federal Court cases and in the *Terengganu* case must be distinguished. (para 29)

(3) The decisions of the Federal Court on the application of O. 14A in *Dream Property*, *Bato Bagi* and *Thein Hong Teck* did not in any way depart or steer away from the decision in the *Terengganu* case, and nor did they change or set any new proposition of law on the application of O. 14A thus laid down in that latter case. Hence, the first question posed was answered in the affirmative. (paras 27 & 29)

(4) An issue is only suitable for determination under O. 14A if the points of law to be determined thereunder have been stated in clear and precise terms and the facts disclosed by the pleadings and affidavit evidence are sufficient for the court to make such determination which would be final as to the entire cause or matter. In this case, the core issue as per the pleadings which was based on the breach of contract cause of action is whether the plaintiff has any rights over petroleum won and saved in the continental shelf off its coast. This core issue has been sufficiently addressed in the proposed questions or issues of law pursuant to O. 14A, and it is clear that the outcome of the plaintiff's claim rested entirely on the determination of this core issue. Such determination, further, will be decisive as to the plaintiff's other causes of action (unfair discrimination, constitutional breaches and estoppel) considering that they are grounded on the underlying presumption that the plaintiff has the rights over petroleum located in the continental shelf off its coast. (paras 36 & 37)

(5) The plaintiff's case with regards to its rights over petroleum won and saved in the continental shelf off its coast is based on the Kelantan Petroleum Agreement and the Kelantan Grant which were entered pursuant to the provisions of the PDA. Clearly, this was a question of law which could be resolved by reference and interpretation of the relevant legislations and contractual documentations without having to go for a full trial of the action. It is trite that where the question of construction is a dominant feature of a case, the court should proceed to determine that issue and it is sufficient if substantial matters thereof can be disposed of. In the present case, the pleadings have made reference to various legislations which were comprehensive and sufficient for the determination of the legal questions involved, to the exclusion of the oral evidence of witnesses. The construction of these agreements did not require the testimony of witnesses as the terms of the agreement were a mandatory reflection of the statutory provisions of the PDA where effect must be given to such provisions. (paras 38 & 39)

(6) The main concern here was the exercise of the discretion of the learned High Court Judge in making the order that the action proceeded by way of O. 14A, as later confirmed by the Court of Appeal. The issue for this court's consideration was therefore whether the High Court and the Court of Appeal decided the matter correctly and in accordance with the principles for such exercise. (para 40)

(7) The learned High Court Judge had considered the material facts before her as disclosed in the pleadings. The learned judge also noted the similarities of the arguments raised before her with that of the *Terengganu* case, and had substantially relied on the reasoning of the Court of Appeal in that case, and further, had correctly identified the differences in the application of facts between the two cases before concluding that this was a proper case to be determined under O. 14A. There was no error or misdirection whether in the application of principle or in law on the part of the learned judge. There was no reason or justification for this court's interference, and consequently the second question posed was answered in the negative. (para 40)

(8) As for the discovery issue in the first appeal, the documents sought were not only very extensive, but irrelevant to the core issue. The documents sought only relate to the issue of quantum of damages and went nowhere towards establishing the issue of liability in the case. In the circumstances, in view of the O. 14A applications herein, the learned judge was correct in holding that discovery was not necessary at that stage of the proceedings. The learned judge's decision in dismissing discovery at that stage of proceedings was in line with the underlying principle under O. 24 r. 4 which underscored that the discovery process was predicated on the issues involved in a particular case. It followed that, in this case, the determination of the core issue in the O. 14A applications had rightly been decided to precede the discovery. It followed further that the exercise of discretion by the learned judge in the matter was in accordance with principles which did not justify this court's interference. (paras 44, 45, 47 & 48)

Bahasa Malaysia *Translation Of Headnotes*

Melalui perjanjian yang dipanggil "Kelantan Petroleum Agreement" dan "Kelantan Grant" yang dimeterai pada 9 Mei 1975 di antara Kerajaan Negeri Kelantan ('plaintif') dan Petroliam Nasional Berhad ('Petronas'), sebuah syarikat yang diberikan kuasa dan hak-hak di bawah Akta Pembangunan Petroliam 1974 ('APP'), plaintif dan Petronas bersetuju bahawa: (i) Petronas mempunyai hak eksklusif, kekal dan tidak boleh dibatalkan untuk meneroka dan mengeksploitasi khazanah petroleum yang terdapat di pesisir pantai Negeri Kelantan ('Kelantan'); dan (ii) Petronas akan membuat pembayaran tunai kepada plaintif dalam bentuk bayaran tahunan yang setara dengan 5% dari nilai petroleum yang diperolehi dan disimpan di situ. Tidak dinafikan bahawa Kelantan Grant yang dimeterai adalah dalam bentuk yang ditetapkan oleh Jadual kepada ss. 2 dan 4 APP, malah merupakan "Vesting Deed" sepertimana ianya dirujuk dalam Akta tersebut. Plaintif mengatakan bahawa Petronas gagal membuat apa-apa pembayaran kepadanya seperti yang dijanjikan, dan oleh yang demikian, dengan mendakwa pelanggaran kontrak, diskriminasi tidak adil, pelanggaran perlembagaan dan estopel, telah memulakan satu tindakan menuntut pelaksanaan spesifik perjanjian-perjanjian. Fakta juga menunjukkan bahawa, ekoran dari tindakan plaintif, Kerajaan

Malaysia, yang mendakwa mempunyai hak eksklusif terhadap petroleum yang ditemui Petronas di pesisiran benua pantai Kelantan, telah memohon dan mendapat kebenaran untuk mencelah dan dinamakan sebagai defendan kedua dalam tindakan. Apapun, pada 10 Februari 2011, plaintif memberikan notis kepada Petronas supaya menyerahkan dokumen-dokumen yang dikatakan relevan kepada tuntutan mereka dan kepada isu bagi menentukan tanggungan Petronas di bawah perjanjian-perjanjian. Ini termasuklah perjanjian-perjanjian dan geran-geran yang dimeterai oleh Petronas dengan Kerajaan-Kerajaan Negeri lain di bawah APP, dokumen berkaitan kawasan-kawasan petroleum yang diperolehi di pesisir laut Kelantan, perjanjian perkongsian pengeluaran yang dimeterai Petronas dengan kontraktor-kontraktor di kawasan-kawasan pengeluaran petroleum, dokumen-dokumen mengenai pengeluaran dan pembayaran yang dibuat antara Malaysia dan Thailand berkaitan dengan Autoriti Bersama Malaysia-Thailand, dan akaun-akaun pembayaran royalti seperti yang dibuat oleh Petronas kepada Kerajaan Persekutuan berhubung kawasan-kawasan pengeluaran petroleum bagi negeri-negeri Kelantan, Sabah, Sarawak dan Terengganu. Permintaan plaintif tidak dilayan oleh Petronas, dan berikutnya plaintif memfailkan tindakan untuk penzahiran dokumen ('permohonan penzahiran') di bawah A. 24 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Sebagai membalas, Petronas dan defendan kedua, melalui permohonan berasingan, memohon ke Mahkamah Tinggi supaya pertikaian diputuskan dengan cara memutuskan beberapa persoalan undang-undang tertentu di bawah A. 14A dan/atau A. 33 k. 2 KMT ('permohonan A. 14').

Pada 7 Oktober 2011, Mahkamah Tinggi menolak permohonan penzahiran atas alasan bahawa dokumen-dokumen yang dipohon adalah sama ada tidak dapat menentukan tanggungan Petronas di bawah perjanjian-perjanjian, atau tidak relevan kepada isu teras sama ada plaintif berhak kepada petroleum yang ditemui di pesisiran benua pantai Kelantan, atau sebaliknya tidak berada dalam milikan atau kawalan Petronas. Yang arif hakim kemudian mendengar permohonan A. 14A, dan pada 18 Januari 2012, membenarkan permohonan tersebut. Dalam memutuskan sedemikian, menjadi pandangan yang arif hakim, berdasarkan kes Mahkamah Rayuan *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu* ('kes *Terengganu*'), bahawa isu teras di atas boleh diputuskan semata-mata melalui pentafsiran dokumen-dokumen dan

tidak memerlukan satu perbicaraan penuh. Plaintif merayu tetapi rayuannya ditolak oleh Mahkamah Rayuan. Plaintif memohon kebenaran untuk merayu dan setelah mendapat kebenaran mengemukakan persoalan undang-undang berikut untuk pemutusan Mahkamah Persekutuan, iaitu: (i) sama ada, mengambilkira keputusan Mahkamah Persekutuan dalam *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd*, *Bato Bagi & Ors v. Kerajaan Negeri Sarawak and Another Appeal* and *Thein Hong Teck & Ors v. Mohd Afrizan Husain and Another Appeal*, ujian terpakai bagi permohonan A. 14A seperti yang diisytiharkan dalam kes *Terengganu* masih terpakai; (iii) sama ada prosedur permohonan A. 14A seperti yang dipakai oleh mahkamah-mahkamah di bawah (tidak) teratur; dan (iii) sama ada mahkamah-mahkamah di bawah betul dalam bergantung kepada A. 24 kk. 4 dan 8 KMT apabila menolak permohonan penzahiran di peringkat prosiding di bawah, dan walau apapun, sama ada permohonan A. 14A patut diputuskan hanya selepas pihak-pihak menyempurnakan penzahiran dokumen-dokumen.

Diputuskan (menolak rayuan-rayuan)
Oleh Abdull Hamid Embong HMP menyampaikan penghakiman mahkamah:

(1) Mahkamah Rayuan di dalam kes *Terengganu* tidak menetapkan kaedah yang tetap dan ketat bagi pelaksanaan A. 14A. Keputusan dalam kes *Terengganu* hanya menghuraikan beberapa faktor relevan yang perlu dipertimbangkan bilamana menangani permohonan A. 14A dan ianya tidak diniatkan sebagai muktamad atau terhad kepada itu sahaja.

(2) Isu-isu dalam *Dream Property* and *Thein Hong Teck*, menurut pandangan Mahkamah Persekutuan, adalah persoalan fakta yang dipertikaikan secara serius oleh pihak-pihak dan memerlukan pemutusan dalam satu perbicaraan penuh, dan di mana A. 14A diputuskan sebagai tidak sesuai. Dalam *Dream Property*, tiada persoalan undang-undang telah dirangka ataupun persoalan khas berkaitan pentafsiran perjanjian dikemukakan oleh plaintif kepada mahkamah untuk pertimbangan. Melalui keputusan kes-kes ini, adalah jelas bahawa kedudukan undang-undang dalam sesuatu permohonan A. 14A adalah bahawa, di mana terdapat pertikaian isu fakta yang serius, maka penggunaan prosedur A. 14A adalah tidak teratur dan tidak sesuai. Sebaliknya, Mahkamah Rayuan di

dalam kes *Terengganu*, selepas meneliti pliding, memutuskan bahawa isu-isu yang dibangkitkan adalah keseluruhannya isu undang-undang yang bersandar kepada pentafsiran dokumen-dokumen dan kerana itu adalah sesuai untuk diputuskan mengikut prosedur A. 14A. Ianya mengikut bahawa fakta dan halkeadaan dalam tiga kes Mahkamah Persekutuan berkenaan hendaklah dibezakan dari fakta dan halkeadaan kes *Terengganu*.

(3) Keputusan Mahkamah Persekutuan berhubung permohonan di bawah A. 14A dalam *Dream Property*, *Bato Bagi* dan *Thein Hong Teck* tidak dengan apa cara sekalipun menyimpang daripada keputusan kes *Terengganu*, dan tidak juga menukar atau membuat apa-apa proposisi undang-undang baru berkaitan pelaksanaan A. 14A berbanding apa yang dinyatakan dalam kes terkemudian tersebut. Oleh itu, soalan pertama yang dikemukakan dijawab secara afirmatif.

(4) Sesuatu isu hanya sesuai untuk diputuskan di bawah A. 14A jika persoalan undang-undang yang hendak diputuskan di bawahnya dinyatakan dalam terma yang jelas dan tepat dan fakta seperti yang dibentangkan dalam pliding dan keterangan afidavit mencukupi bagi mahkamah membuat keputusan dengan muktamad dan secara yang memuktamadkan keseluruhan kausa dan halperkara. Dalam kes ini, berdasarkan pliding, isu teras yang dilandaskan kepada kausa tindakan pelanggaran kontrak adalah sama ada plaintif mempunyai hak kepada petroleum yang diperoleh dan disimpan di pesisiran benua di luar pantainya. Isu teras ini disentuh secukupnya dalam isu-isu dan persoalan undang-undang yang dicadangkan di bawah A. 14A dan adalah jelas bahawa kesudahan tuntutan plaintif bergantung sepenuhnya kepada pemutusan isu teras ini. Selain itu, pemutusan isu teras tersebut juga akan memutuskan dengan muktamad kausa-kausa tindakan plaintif yang lain (diskriminasi tidak adil, pelanggaran perlembagaan dan estopel), memandangkan kausa-kausa ini dilandaskan pada andaian bahawa plaintif mempunyai hak kepada petroleum yang terdapat di pesisiran benua pantainya.

(5) Kes plaintif berkaitan haknya terhadap petroleum yang ditemui dan disimpan di pesisiran benua pantainya adalah berasaskan Perjanjian Petroleum Kelantan dan Kelantan Grant yang dimeterai dengan Petronas di bawah peruntukan APP. Jelas

bahawa ini adalah persoalan undang-undang yang boleh diputuskan melalui rujukan dan tafsiran undang-undang relevan serta dokumen-dokumen kontraktual tanpa perlu menjalankan perbicaraan penuh tindakan. Adalah lumrah bahawa di mana persoalan pentafsiran merupakan perkara dominan dalam sesuatu kes, maka mahkamah akan meneruskan dengan pemutusan perkara tersebut dan adalah memadai untuk memutuskan sebahagian besar dari perkara-perkara berbangkit di dalam kes. Dalam kes semasa, pliding-pliding telah membuat rujukan secara komprehensif kepada berbagai undang-undang yang mana adalah mencukupi untuk memutuskan isu undang-undang yang berbangkit, tanpa memerlukan keterangan saksi-saksi. Pentafsiran perjanjian-perjanjian ini tidak memerlukan testimoni saksi-saksi kerana terma perjanjian adalah refleksi mandatori peruntukan-peruntukan APP yang mana perlu diberikan kesannya.

(6) Persoalan utama di sini adalah pelaksanaan budibicara oleh yang arif hakim Mahkamah Tinggi dalam membuat perintah bahawa tindakan perlu diteruskan melalui A. 14A, seperti yang disahkan kemudiannya oleh Mahkamah Rayuan. Oleh itu, isu untuk pertimbangan mahkamah ini adalah sama ada Mahkamah Tinggi dan Mahkamah Rayuan memutuskan halperkara dengan betul dan mengikut prinsip-prinsip berkaitan pelaksanaan budibicara sedemikian.

(7) Yang arif hakim Mahkamah Tinggi telah mempertimbang fakta-fakta material di hadapannya seperti yang tertera di dalam pliding-pliding. Yang arif hakim juga mengambilkira akan kesamaan hujahan yang dibuat di hadapannya dengan yang dibuat dalam kes *Terengganu*, dan banyak bergantung kepada taakulan-taakulan kes Mahkamah Rayuan tersebut, dan lagi, telah dengan betulnya mengenalpasti perbezaan-perbezaan dalam pelaksanaan fakta di antara kedua-dua kes sebelum memutuskan bahawa ini adalah kes yang sesuai untuk diputuskan di bawah A. 14A. Tiada apa-apa kesalahan atau salah arahan sama ada dalam pelaksanaan prinsip mahupun undang-undang di pihak yang arif hakim. Tiada sebab untuk mahkamah ini campur tangan dan dengan itu soalan kedua dijawab secara negatif.

(8) Berhubung isu penzahiran di dalam rayuan pertama, dokumen-dokumen yang diminta bukan sahaja sangat banyak, tetapi juga tidak relevan kepada isu teras. Dokumen yang dipohon hanyalah berkaitan dengan isu kuantum untuk gantirugi dan tidak terarah kepada menentukan isu liabiliti di dalam kes. Oleh hal yang demikian, memandangkan kewujudan permohonan A. 14A di sini, yang arif hakim betul dalam memutuskan bahawa penzahiran adalah tidak perlu di peringkat prosiding tersebut. Keputusan yang arif hakim dalam menolak penzahiran di peringkat prosiding tersebut adalah selari dengan prinsip di bawah A. 24 k. 4 yang menekankan bahawa proses penzahiran adalah bergantung kepada isu-isu yang berbangkit dalam sesuatu kes. Ianya mengikut bahawa, dalam kes ini, pemutusan isu teras dalam permohonan A. 14A telah dengan betulnya diputuskan sebagai mendahului penzahiran. Ianya mengikut selanjutnya bahawa pelaksanaan budibicara oleh yang arif hakim di dalam halperkara adalah menurut prinsip sekaligus tidak mewajarkan campur tangan mahkamah ini.

Case(s) referred to:

Allen v. Gulf Oil Refining Ltd [1980] QB 156 ***(refd)***

Amalgamated Society of Engineers v. Adelaide Steamship Co [1920] HCA 54 ***(refd)***

Attorney General of Belize v. Belize Telecom Limited [2009] 2 All ER 1127 ***(refd)***

Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal [2011] 8 CLJ 766 FC ***(dist)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2008] (FC) (Unreported) ***(dist)***

Faber Merlin Malaysia Bhd v. Ban Guan Sdn Bhd [1980] 1 LNS 189 FC ***(refd)***

Glamour Green Sdn Bhd v. AmBank Bhd & Ors & Another Appeal [2007] 3 CLJ 413 CA ***(refd)***

Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 All ER 98 ***(refd)***

Korso Finance Establishment Anstalt v. John Wedge, 15 Feb 1994, CA Transcript No. 14/387 (Unreported) ***(refd)***

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal [2003] 4 CLJ 337 CA ***(dist)***

R (Westminster City Council) v. National Asylum Support [2002] 4 All ER 654 ***(refd)***

Seloga Jaya Sdn Bhd v. UEM Genisys Sdn Bhd [2008] 2 CLJ 686 CA ***(refd)***

Thein Hong Teck & Ors v. Mohd Afrizan Husain & Another Appeal [2012] 1 CLJ 49 FC ***(dist)***

Legislation referred to:
Evidence Act 1950, ss. 95, 97, 98
Federal Constitution, arts. 8, 13
Petroleum Development Act 1974, ss. 2, 4
Rules of Court 2012, O. 24 rr. 4, 8
Rules of the High Court 1980, O. 14A, O. 15 rr. 6(2)(b)(i), (ii), O. 24 rr. 1(1), 2(1), 4(1), 8, O. 33 r. 2

For the appellant - Tommy Thomas (Sitpah Selvaratnam & Rahayu Mumazaini with him); M/s Tommy Thomas
For the 1st respondent - Cecil Abraham (Rishwant Singh with him); M/s Zul Rafique & Partners
For the 2nd respondent - Suzana Atan (Shamsul Bolhassan with her); SFCs

[Appeal from Court of Appeal; Civil Appeals No: W-01(IM)(NCVC)-635-10/2011; W-01(IM)(NCVC)-73-02/2012 & W-01(IM)(NCVC)-74-02/2012]

Reported by Wan Sharif Ahmad

JUDGMENT

Abdull Hamid Embong FCJ:

[1] These three appeals were heard together before this court as the issues were common. The plaintiff who is now the appellant, is the State Government of Kelantan. The first defendant (Petronas), now the first respondent, is a company incorporated under the Companies Act 1965 and conferred by statute with the rights, powers, privileges and liberties as spelt out in the Petroleum Development Act 1974 ("PDA") with respect to winning and obtaining petroleum in Malaysia. The second defendant, now the second respondent, is the Federal Government of Malaysia. In this judgment, we shall refer to the parties as they were in the High Court. The first defendant will be referred to as Petronas.

[2] By an agreement dated 9 May 1975 entered into between the plaintiff and Petronas ("the Kelantan Petroleum Agreement"), it was agreed that in consideration of the entire ownership in, and the exclusive rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining petroleum whether lying onshore or offshore Kelantan being vested in the Petronas by the plaintiff, Petronas shall make to the plaintiff cash payments in the form of

A a yearly sum amounting to the equivalent of 5% of the value of the petroleum won and saved on-shore and off-shore Kelantan and sold by Petronas, its agents or contractors. The Kelantan Petroleum Agreement was executed pursuant to the provisions of ss. 2 and 4 of the PDA.

B

[3] In consideration of Petronas agreeing to make cash payments to the plaintiff under the Kelantan Petroleum Agreement, the plaintiff granted in perpetuity, conveyed to and vested in Petronas, the ownership in and the exclusive rights, powers, liberties and C privileges of exploring, winning and obtaining petroleum whether lying on-shore or off-shore Kelantan ("the Kelantan Grant").

[4] The Kelantan Grant was executed in writing on 9 May 1975, which grant was accepted, also in writing, by Petronas. The Kelantan Grant was executed in the form provided by the D Schedule and pursuant to the provisions of ss. 2 and 4 of the PDA, and represented the vesting deed referred to in the PDA. The grant, conveyance and vesting were declared in the Kelantan Grant to be irrevocable.

E **[5]** It was alleged by the plaintiff in its statement of claim that, in total failure of its consideration and in breach of its obligations under the PDA, the Kelantan Petroleum Agreement and the Kelantan Grant, Petronas has failed:

F (i) To provide any information about its exploration activities in areas off-shore Kelantan;

(ii) To provide any information about the extent of its production of petroleum off-shore Kelantan; and

G (iii) To make cash payments in respect of the petroleum won offshore Kelantan.

[6] The plaintiff contends that by virtue of the PDA, the Kelantan Petroleum Agreement and the Kelantan Grant, Petronas H is obliged to make cash payments for all petroleum won off-shore Kelantan.

[7] By letter dated 31 December 2009, the then Menteri Besar of Kelantan wrote to the President and Chief Executive Officer of I Petronas requesting for cash payments to be paid to the Kelantan State for petroleum won off-shore Kelantan.

[8] By letters dated 2 February 2010 and 12 April 2010 the President and Chief Executive Officer of Petronas replied stating that the plaintiff was not entitled to receive any cash payments.

[9] The plaintiff filed an action against Petronas at the High Court and from its statement of claim, the plaintiff relied on the following causes of action, *viz*. (i) breach of contract; (ii) unfair discrimination; (iii) breach of arts. 8 and 13 of the Federal Constitution; and (iv) estoppel. The plaintiff prays for relief of specific performance and an account be taken or an inquiry be ordered for Petronas to make full and truthful disclosure of all relevant facts relating to the cash payment payable to the plaintiff for the period from which petroleum has been produced, own or obtained, and also an order that all future cash payments be paid to the plaintiff for petroleum produced offshore of Kelantan in accordance to the terms of the PDA and the Kelantan Petroleum Agreement.

[10] On 16 November 2010, the Government of Malaysia filed an application pursuant to O. 15 rr. 6(2)(b)(i) and (ii) of the Rules of the High Court 1980 ("RHC") for leave to intervene and be joined as the second defendant in the suit (the joinder application). The High Court allowed the second defendant's joinder application. The plaintiff lodged an appeal to the Court of Appeal against the High Court's decision on the joinder application but was dismissed by the Court of Appeal on 7 June 2011. The Court of Appeal held that the plaintiff's claim over petroleum in the continental shelf offshore Kelantan which was premised on the Kelantan Petroleum Agreement clearly affected the rights of the second defendant, who in turn alleged that petroleum lying in waters beyond three nautical miles adjacent to the coasts of Kelantan and in the continental shelf belonged to the second defendant. The Court of Appeal was also of the view that the addition of the second defendant in the suit was clearly necessary to ensure that the matter in dispute arising from ownership of petroleum was effectually and completely determined and adjudicated upon. In view of the addition of the second defendant in the suit, the plaintiff claimed for damages against the second defendant.

[11] Meanwhile, the plaintiff served its notice to produce documents dated 10 February 2011 on Petronas. The said notice sought Petronas to produce documents, which the plaintiff alleged

relate directly to matters pleaded by them in the statement of claim. The plaintiff also alleged that the documents requested are relevant to determine the issue of liability owed by Petronas to the plaintiff and future payments payable by the former to the latter. However, despite demands, Petronas did not disclose any document from the list of documents as requested in the said notice.

[12] This led to the filing of the application for discovery by the plaintiff on 23 March 2011, seeking for orders that Petronas deliver copies of documents which are or have been in its possession, custody or power relating to any matter or issue in question in the suit (the discovery application).

[13] Thereafter, on 30 March 2011 and 21 April 2011, Petronas and the second defendant, by separate applications, applied to the High Court for certain proposed questions of law to be determined in the suit under O. 14A and/or O. 33 r. 2 of the RHC ("the O. 14A applications").

[14] Petronas proposed the following questions of law:

(a) Did the plaintiff have any rights over petroleum won and saved in the 'continental shelf' (as defined in the Continental Shelf Act, 1966) ("CSA") (hereinafter "Continental Shelf") off the plaintiff's coast up to and just prior to:

(i) The enactment of the Petroleum Development Act 1974 ("PDA")?

(ii) The execution of the agreement dated 22 March 1975 between the plaintiff and Petronas?

(b) Did the plaintiff vest any rights to petroleum won and saved in the Continental Shelf off the plaintiff's coast in Petronas *vide*:

(i) The 'Vesting Instrument';

(ii) The agreement dated 22 March 1975 between the plaintiff and Petronas?

(c) Is the plaintiff entitled to payment under s. 4 of the PDA in respect of petroleum won and saved in the Continental Shelf off the plaintiff's coast?

(d) In the circumstances of para. 47 of the statement of claim, does the doctrine of estoppel apply to Petronas? A

(e) Is the plaintiff's claim against the Petronas with respect to petroleum won and saved by the Malaysian-Thailand Joint Authority in the Malaysian-Thailand block maintainable in light of the law including the Malaysia-Thailand Joint Authority Act 1990? B

(f) Whether:

(i) The testimony of the parliamentary draftsman and/or other persons involved in the drafting of the PDA as to government policy and/or intention is admissible at law in the construction of the PDA; and if admissible, whether, C

(ii) Such evidence reflects the will or the intention of Parliament as expressed by the provisions of the PDA. D

[15] The second defendant, meanwhile, proposed the questions of law as follows:

(a) Did the plaintiff have any rights under the law over petroleum won and saved in the 'continental shelf' (as defined in the Continental Shelf Act, 1966) ("CSA") (hereinafter "Continental Shelf") off the plaintiff's coast up to and just prior to: E

(i) The enactment of the Petroleum Development Act 1974 ("PDA")? F

(ii) The execution of the agreement dated 22 March 1975 between the plaintiff and Petronas? G

(b) If the answer to the first question is in the negative, can the plaintiff however legally vest any rights to petroleum won and saved in the Continental Shelf (as defined in the Continental Shelf Act, 1966) off the plaintiff's coast in Petronas *vide*: H

(i) The 'Vesting Instrument'; or

(ii) The agreement dated 22 March 1975 between the plaintiff and Petronas,

to enable the plaintiff to receive payments in relation to it? I

(c) On the real and true interpretation of s. 4 of the PDA, is there any payment that must be made to the plaintiff in respect of petroleum won and saved in the Continental Shelf according to the vesting instrument and agreement dated 22 March 1975 between the plaintiff and Petronas?

[16] On 7 October 2011, the discovery application was dismissed by the High Court based on the following grounds:

(i) That the 12 agreements between Petronas and each of the State Governments (excluding Kelantan) which were executed pursuant to s. 2 of the PDA and the agreement between Petronas and the second defendant and the 12 grants executed by each of the state governments (excluding Kelantan) pursuant to s. 2 of the Schedule to the PDA, and the Grant executed by the Federal Government which were being requested by the plaintiff to be disclosed are not relevant in the exercise in determining liability as it relates to other states, not Kelantan;

(ii) That these documents do not go towards the liability of Petronas under the claim by the plaintiff. The plaintiff's claim is in relation to its rights under Kelantan Petroleum Agreement with Petronas, and not to the agreements with the other 12 states. As far as liability is concerned, which the court will have to construe, will be the terms in the agreement between the plaintiff and Petronas ie, the plaintiff's rights to its entitlement under its Kelantan Petroleum Agreement with Petronas;

(iii) As for the request of all documents containing information pertaining to areas of petroleum won and obtained offshore Kelantan from the date of its very first discovery, if this is to be allowed, it will involve voluminous documents. The discovery of these documents would not determine the issue of liability for now. In any event Petronas has stated that they are not in possession of those documents;

(iv) As for documents signed between the independent and sovereign nations of Thailand and Malaysia and the documents executed by the Malaysian-Thailand Joint Authority 1990, Petronas is not concerned with and cannot have any rights with regards to the exclusive rights, powers,

liberties and privileges of exploring and exploring the natural resources, including petroleum, which fall within the Joint Development Area (as defined by the Malaysian-Thailand Joint Authority Act 1990) and therefore it is not within Petronas' control to produce the documents;

(v) That documents at para. D (17) & (19) of exh. NA-1 of encl. 12 are not relevant and the discovery of these documents would not determine the central issue of liability ie, whether the plaintiff is entitled to petroleum won beyond the 3 nautical miles offshore;

(vi) That documents at para. E (i) & (ii) 28-34 (5)-(12) of exh. NA-1 of encl. 12 relate to quantum in the event liability is found in favour of the plaintiff. At this point in time, the discovery of these documents would not determine the issue of liability of Petronas;

(vii) That documents at para. F (35-38) – these relate to quantum in the event liability is found for the plaintiff. These are not relevant and the discovery of these documents is not relevant to the central issue;

(viii) Parties should proceed for the hearing of O. 14A as scheduled to prevent further waste of judicial time and costs, as that would determine the issue of liability. Some of the documents which are being sought by the plaintiff are relevant on the issue of quantum. Hence it would be a futile exercise if the court allowed the discovery of those documents at this stage, when ultimately after the hearing of the application under O. 14A the decision is against the plaintiff.

[17] Subsequently, on 18 January 2012, the High Court allowed both Petronas and second defendant's O. 14A applications based on the following grounds:

(i) That all the issues that are raised in the present case have all been dealt with by the Court of Appeal in *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337; [2004] 1 MLJ 8 when determining as to whether the case is suitable to be dealt with under O. 14A or O. 33 of the RHC, on the preliminary questions of law;

(ii) That there is no necessity to call witnesses to give evidence with regards to the existence or ascertainment of material facts in the matter. The main thrust of the plaintiff's claim can be determined by the determination of the core question which can be derived from the pleadings. It involves the interpretation and construction of the relevant agreements and legislations, which are purely questions of law. The determination of this core question will determine the other corollary causes of action pleaded by the plaintiff. The legislations that are being referred to in the present suit are not ambiguous, obscure or the literal meaning leads to absurdity. As far as the interpretation of statutes or legislations is concerned, it is to be derived from the intention of Parliament by looking at the words used. As to what the executive or the draftsman intended or what the relevant Ministers or Chief Ministers might have in mind is irrelevant to the object of statute interpretation (*Amalgamated Society of Engineers v. Adelaide Steamship Co* [1920] HCA 54; *R (Westminster City Council) v. National Asylum Support*) [2002] 4 All ER 654;

(iii) That as far as construction of contractual agreements are concerned, the principle is that the court does not admit as evidence the subjective desires of parties in previous negotiations (*Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 All ER 98; *Glamour Green Sdn Bhd v. AmBank Bhd & Ors & Another Appeal* [2007] 3 CLJ 413, *Attorney General of Belize v. Belize Telecom Limited* [2009] 2 All ER 1127);

(iv) To determine the core issue which is whether the plaintiff has the rights to petroleum discovered offshore in the continental shelf can be deduced from the construction of documents without having to go through a full trial. As such no intrinsic evidence should be adduced. There is no requirement for a full blown trial just to determine the factual matrix or the background to the existence of the PDA and the various agreements and legislations which are the subject of legal construction in the present case;

(v) The two cases of *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2008] (FC) (Unreported) and *Bato Bagi & Ors. v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766;

[2011] 6 MLJ 297 relied on by the plaintiff are not favourable to the plaintiff in determining whether the present case is one where O. 14A is not applicable.

[18] On appeal, the Court of Appeal had on 26 April 2012 dismissed the plaintiff's appeals against both the decisions of the High Court in respect of the discovery application and the O. 14A application and affirmed the decisions of the High Court.

The Questions

[19] Before us, there are three appeals. The first appeal is only against Petronas and is in relation to the discovery issue, in which leave to appeal was granted by this court on 3 October 2012 on the following questions of law:

(i) Whether O. 14A proceedings should only be determined after the parties have completed discovery of documents in their writ action so that all the evidence is before the court prior to the disposal of the said O. 14A proceedings;

(ii) What is the true scope and extent of O. 24 rr. 4 and 8 of the Rules of Court 2012 which provide that a court may delay discovery pending the determination of an issue or question; and following from this, whether the courts below were correct in relying on O. 24 r. 4 of the Rules of the High Court, 1980 (now O. 24 r. 4 Rules of Court 2012) read with O. 24 r. 8 Rules of the High Court 1980 (now O. 24 r. 8 of the Rules of Court 2012) in not ordering discovery at that stage in the proceedings?

[20] The second and third appeals are against both Petronas and the second defendant which relate to the O. 14A issue. In these two appeals, leave to appeal was granted on the following questions of law:

(i) Whether the test for the application of O. 14A of the Rules of the High Court 1980 in *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337; [2004] 1 MLJ 8 applies to O. 14A of the Rules of Court 2012 and if not, what is the applicable test in the light of the following decisions of the Federal Court:

(a) *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* 5 September 2008 (Unreported);

(b) *Bato Bagi & Ors v. Kerajaan Negeri Sarawak & Another Appeal* [2011] 8 CLJ 766; [2011] 6 MLJ 297;

(c) *Thein Hong Teck & Ors. v. Mohd Afrizan Husain And Another Appeal* [2012] 1 CLJ 49; [2012] 2 MLJ 299;

(ii) Following from the above, whether in the circumstances of this case, the O. 14A procedure is appropriate:

(a) Where there are serious factual disputes and the material facts can only be ascertained by cross-examination of witnesses at trial; and

(b) Where numerous written laws have to be interpreted.

Second And Third Appeals – O. 14A Issue

[21] We will deal with the second and third appeals on the issue of O. 14A first since this issue is central in both appeals and also forms part of the questions posed in the first appeal on the discovery issue.

[22] Before us, learned counsel for the plaintiff submitted that the decision of the learned Judge of the High Court in allowing Petronas and the second defendant's O. 14A applications was based heavily on the judgment of the Court of Appeal in the case of *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337; [2004] 1 MLJ 8 ("the *Terengganu* case"), which the Court of Appeal affirmed. In that case, the plaintiff ie, the State of Terengganu brought an action against the defendants (who are also Petronas and the second defendant in the present appeals), seeking among others an order for specific performance of a vesting instrument and a principal agreement entered into between the plaintiff and Petronas, in which Petronas was allegedly obliged to make payment to the plaintiff, in return of Petronas having acquired rights over petroleum onshore and offshore Terengganu. Petronas made payment for 22 years before it stopped payment on the basis that the principal agreement was void and *ultra vires* the Petroleum Development Act 1974. Petronas and the second defendant then, by separate applications, applied before the High Court for certain proposed questions of law to be determined both under O. 14A and O. 33 r. 2 of the Rules of the High Court 1980. The High Court dismissed the applications on the ground that the case involved a number of

complex legal issues and should, therefore, proceed to trial. On appeal, the Court of Appeal allowed the appeals by Petronas and the second defendant. In allowing the appeals, the Court of Appeal found that the High Court judge had merely considered the pleadings and submissions of the parties and concluded that the case was far from being plain and simple because it raised a number of complex legal issues. The Court of Appeal was of the view that the High Court judge failed to identify and make proper appraisal of the material facts pleaded which were obviously undisputed or which should not have been disputed and that his consideration on the matter was therefore inadequate, incomplete and unsustainable, and hence his exercise of discretion on the matter was held incorrect.

[23] Learned counsel for the plaintiff contended that the *Terengganu* case is no longer good law in the light of several more recent Federal Court decisions on O. 14A which have not only expanded, but steered away from the application of the *Terengganu* case when determining O. 14A applications. In this respect, learned counsel for the plaintiff has brought to our attention the decisions by the Federal Court in the following cases on O. 14A application:

(i) *Dream Property v. Atlas Housing*; 5 September 2008 (Unreported);

(ii) *Bato Bagi & Ors. v. Kerajaan Negeri Sarawak* [2011] 8 CLJ 766; [2011] 6 MLJ 297;

(iii) *Thein Hong Teck & Ors. v. Mohd Afrizan Husain & Another Appeal* [2012] 1 CLJ 49; [2012] 2 MLJ 299;

[24] In light of the above cases, learned counsel for the plaintiff then referred to us the following passages of the judgment of the Court of Appeal in the *Terengganu* case, which he argued, severely restricts and curtails the right of a party with a substantive claim to lead and extract relevant evidence in the manner long established and recognised as a litigant's basic right, by way of a trial through the examination and cross-examination of witnesses:

> Legally, in O. 14A and O. 33 r. 2 of the RHC applications no party has any liberty to disagree just for the sake of disagreeing to any fact pleaded which is obviously undisputed because for the

court to give indulgence to such disagreement will not only erode the efficacy but also will stultify the objective and purpose of those Orders. On that basis, we scrutinized the pleadings and the Proposed Statement of Agreed Facts (re Appendix 11), then we called upon the parties to submit on the Proposed Statement of Agreed Facts wherein certain facts, which were not agreed to previously, had been agreed to by the defendants, and finally, having considered the respective submission on the matter we decided to impose upon the parties to accept the facts which, in our considered view, having regard to the other related facts which are obviously undisputed or facts which had been agreed to by the defendants, should have been agreed to by the parties, with or without variation or reservation ...

... However, that liberty is to be subject to the constraints and limitations as dictated in this judgment relating to the matters that may be proved by affidavit evidence except that in the case of pleaded facts which are not sufficient for the purpose of determining the additional question of law (per Appendix D) affidavit evidence may be used by the parties. However, the decision whether to allow such application, if any, and to what extent it should be allowed and the nature and extend of the affidavit evidence to be used for the limited purposes as aforesaid, is left entirely to the learned judge's discretion.

[25] It was further argued by learned counsel for the plaintiff that the correct proposition of law on O. 14A now, as envisaged in the recent decisions of the Federal Court in the cases referred above, is that where facts are interwoven with legal issues, the splitting of legal and factual determination is considered inappropriate and hence negating such application in the determination of a matter.

[26] Learned counsel for Petronas submitted that the decisions of the Federal Court on O. 14A in cases referred to by learned counsel for the plaintiff do not depart from the *Terengganu* case and further, do not set up any new proposition of law. It was argued by learned counsel for Petronas that in *Dream Property* and *Thein Hong Teck* respectively, the Federal Court had decided that recourse to O. 14A is unsuitable in the circumstances of those cases since there were serious dispute of facts involved, which can be distinguished from the present case. It was further argued that the Federal Court in *Bato Bagi* also made no critical remark on the decision in the *Terengganu* case. In this regard, the same stand was also taken by learned Senior Federal Counsel for the second defendant.

[27] We are in agreement with the submission of learned counsel and Senior Federal Counsel for Petronas and second defendant respectively that the decisions of the Federal Court on the application of O. 14A in the three cases cited above do not in any way depart or steer away from the decision in the *Terengganu* case. In our view, the Court of Appeal in the *Terengganu* case did not attempt to lay down a hard and fast rule on the application of O. 14A. The decision in the *Terengganu* case merely stated some of the relevant factors which should be considered in dealing with an application under O. 14A and they are not meant to be exhaustive. This view had already been expressed by Richard Malanjum, CJSS in *Bato Bagi* which says:

> With respect, I do not think the Court of Appeal in *Petroleum Nasional Bhd (supra)* laid down a hard and fast rule for courts to comply with when confronted with applications under O. 14A. All the Court of Appeal did was to state the relevant factors which should be considered and which in my view the relevant factors to consider are not exhaustive ...

[28] We share the same view as expressed in *Bato Bagi* above and we are unable to understand how the decision in that case can be said to have steered away from the decision of the Court of Appeal in the *Terengganu* case, as argued by counsel for the plaintiff.

[29] Meanwhile, *Dream Property* concerns the issue of the determination of delivery of vacant possession and the confirmation thereof pursuant to the special condition of a sale and purchase agreement entered into between the parties. In *Thein Hong Teck*, among the critical disputes were the issues of dissolution of a partnership before the filing of a petition for winding up and the preservation of rights of the partnership in respect of legal actions commenced before the dissolution of the partnership (as a result of the Federal Court order in one of the many suits filed in connection with the partnership). The issues in these two cases, as viewed by the Federal Court, were questions of facts which were seriously disputed between the parties and required to be determined in a full trial, to which the application of O. 14A was held unsuitable in the circumstances of those cases. In addition, it is also to be noted that in *Dream Property*, there was no question of law framed or a specific question on the construction of the agreement forwarded by the plaintiff to the court for consideration.

By the above decisions, it is clear that the position of the law in an O. 14A application is that where there are serious disputes of facts involved, it is inappropriate and unsuitable to have recourse to an O. 14A procedure. In contrast, the Court of Appeal in the *Terengganu* case, after having carefully scrutinised the pleadings, concluded that the issues raised were purely legal issues based on the construction of documents which are suitable to be determined by the O. 14A procedure. In our considered view, the facts and circumstances in the three cases above and in the *Terengganu* case must be distinguished. The decisions of the Federal Court in those three cases did not change or set up any new proposition of law on the application of O. 14A laid down in *Terengganu* case and therefore, we answer the first question posed in the affirmative.

[30] Now we turn to the second question on O. 14A issue.

[31] Learned counsel for the plaintiff argued that the proposed issues of law put forward by Petronas and the second defendant pursuant to their O. 14A applications are substantially issues pleaded by Petronas and the second defendant in their respective defences. They do not deal with majority of the issues raised in the statement of claim and are very much oriented from Petronas and the second defendant's perspectives. It was further argued that the said proposed issues of law, if determined in such a manner, would not cover the dispute in its entirety.

[32] Learned counsel for the plaintiff submitted that apart from relying on the breach of contract cause of action, there are also other alternative causes of action pleaded by the plaintiff in its action against Petronas. These causes of action include unfair discrimination, deprivation of property without compensation, breach of Federal Constitution and estoppel. He argued that these causes of action are independent of and separate from the contract cause of action and they are clearly of a factual nature. It follows that in order to make good its pleading, evidence has to be led at trial on these causes of action, which in the circumstances of the case makes determination by way of affidavit evidence inappropriate.

[33] Learned counsel for the plaintiff also submitted that the existence of the two main documents which form the basis of the plaintiff's claim against Petronas, namely the Kelantan Petroleum Agreement and the Kelantan Grant are derived from the provisions

of the PDA. It was suggested that it is essential, therefore, that the plaintiff should be allowed to lead evidence, by calling witnesses to testify at trial, on the historical background leading to the execution of the two agreements and the objects of the PDA. Further, it was also suggested that in construing the agreements and the PDA, reference should not only be limited in source to the Hansard, but instead one has to look to the surrounding circumstances leading to the execution of the agreements such as the intention and conduct of the parties at the time of the contract, their concession and acceptance of rights and entitlement, the mischief they intend to address, etc. This, however, as argued by learned counsel for the plaintiff, can only be examined by the oral testimony of the witnesses at trial. Learned counsel for the plaintiff also relied on the provisions of ss. 95, 97 and 98 of the Evidence Act 1950 in support of his argument on the need of the evidence of expert witness in establishing the plaintiff's case among others on the issues of sovereignty and independence, the historic position of Kelantan, its territorial boundary, the special meaning of the expression "off-shore" used in both the Kelantan Petroleum Agreement and the PDA, the representations made by Petronas giving rise to estoppel, and the context in which Petronas made such representations as a commercial and business entity and the conduct of Petronas giving rise to a legitimate expectation, regardless of strict legal rights.

[34] Learned counsel for Petronas submitted that the core question, which forms the very first question proposed by Petronas to be determined under the O. 14A application, is whether the plaintiff has any rights to petroleum located in the continental shelf off its coast. He argued that this is a matter which purely involves the construction and interpretation of statutes and documents without the necessity to have the evidence of witnesses to be tendered in court. It was also argued by learned counsel for Petronas that the other causes of action relied by the plaintiff are either collateral to the core question or dependent on an underlying assumption that the plaintiff has such rights. It was argued that the determination of the core question, if answered against the plaintiff, has the following consequences. First, the other causes of action that are collateral to the core question will clearly *ipso facto* fail. Second, those causes of action that are predicated upon an underlying assumption that such rights are

possessed will concomitantly fail. It is however submitted by learned counsel for Petronas that regardless of whether or not the whole action would be able to be disposed of, the principles in an O. 14A application is that it is sufficient that if the substantial matter can be disposed of.

[35] Learned counsel for Petronas further contended that the obligation of Petronas to make cash payment to the plaintiff, whether under the Kelantan Petroleum Agreement or under the PDA is a question of law and similarly, the interpretation of both the agreement and the PDA are questions of law. It was argued that the Kelantan Petroleum Agreement is an agreement provided for by the PDA and the terms are set out in the statutory agreement as provided for in the Schedule to the PDA, which are not negotiated. As such, it was argued by learned counsel for Petronas that the recollection of matters by witnesses of their understanding of the agreement of the PDA is both irrelevant and inadmissible. It follows that the exercise of contractual interpretation and statutory interpretation by a court of law cannot be aided by the testimony of witnesses.

[36] It is well settled that an issue is only suitable for determination under O. 14A if the points of law to be determined thereunder have been stated in clear and precise terms and the facts disclosed by the pleadings and affidavit evidence are sufficient for the court to make such determination which would be final as to the entire cause or matter (see *Allen v. Gulf Oil Refining Ltd* [1980] QB 156 and *Seloga Jaya Sdn Bhd v. UEM Genisys Sdn Bhd* [2008] 2 CLJ 686). The trial judge is therefore vested with the discretion to rely on the pleadings or to rely on affidavit evidence before him to determine whether the matter is suitable for determination without full trial of the action (see *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd supra*). The plaintiff in its statement of claim pleaded that the rights and ownership of petroleum, whether onshore or offshore belong to the plaintiff. The plaintiff contended that pursuant to the PDA and the Kelantan Petroleum Agreement signed between the plaintiff and Petronas, the plaintiff had freely and voluntarily relinquished to Petronas the ownership of all petroleum/land rights in good faith and for valuable consideration in the form of cash payments referred to in the PDA and the Kelantan Petroleum Agreement. The plaintiff further contended that it was not the intention of the

plaintiff that ownership of its petroleum resources and the rights and privileges of exploiting, winning and obtaining petroleum onshore and offshore Kelantan would be vested without consideration or compensation, that is, as a gift to Petronas. In contrast, Petronas in its defence contended that the plaintiff's rights, if any, in respect of land or ownership of petroleum or the exploration, exploitation or winning of petroleum in any form is limited to three nautical miles adjacent to the coast of the State of Kelantan (its territorial waters). Petronas further contended that the plaintiff never possessed any rights of whatsoever nature in and over the sea and submerged land beyond the territorial waters off and the continental shelf adjacent to the coast of the State of Kelantan and in the circumstances there is no liability on the part of Petronas to make payment claimed for by the plaintiff whether under contract or in law. Meanwhile, the second defendant in its defence contended that petroleum won and saved by Petronas in the continental shelf belonged to the second defendant and as such denied the plaintiff's rights to any cash payment in that respect.

[37] From the pleadings, we agree that in this case, the core issue as has rightly been pointed out by learned counsel for Petronas is whether the plaintiff has any rights over petroleum won and saved in the continental shelf off its coast. This issue was similarly pointed out by the Court of Appeal as the crux of the plaintiff's claim in the *Terengganu* case. We have laid down the proposed questions or issues of law in respect of Petronas and the second defendant's applications pursuant to O. 14A in the earlier part of our judgment and do not wish to reproduce them here. Suffice to say that on perusal of those questions, we are of the view that this core issue has been sufficiently addressed in the said questions so as to determine the crux of the plaintiff's case. Apart from the breach of contract cause of action, the plaintiff also relied on other causes of action as the basis of its claim against Petronas. The said causes of action, namely unfair discrimination, breaches of arts. 8 and 13 of the Federal Constitution and estoppel are grounded on the underlying assumption that the plaintiff has the rights over petroleum located in the continental shelf off its coast and obviously they are interrelated to and dependent on the said asserted rights. In our considered view, the outcome of the plaintiff's claim rested entirely on the determination of the core issue and such determination will

be decisive as to the plaintiff's other causes of action. The same argument was put forward and dealt with by the Court of Appeal in the *Terengganu* case. In this respect, we agree with the Court of Appeal's view on this matter which says:

> The core or primary issue is contained in the first three questions posed in the respective application. The three questions are identical though couched in different form. They are clearly defined and the plaintiff does not complain about them. The first question is whether the plaintiff has any right over petroleum in the continental shelf prior to the enactment of the PDA and the execution of the principal agreement. The second question is whether the plaintiff vested any right to petroleum won and saved in the continental shelf of the coast of Terengganu in the 1st defendant pursuant to the vesting instrument and the principal agreement. And, the third question is whether the plaintiff is entitled to the payment as stipulated in the principal agreement. The extra two questions posed by the first defendant are subsidiary issues and are also clearly defined. No doubt, all the questions are purely questions of law. Logically, if the answer to the first question is in the plaintiff's favour, the answers to the second and third questions should also be in the plaintiff's favour. Hence, the answers will be decisive of the main or a substantive part of the suit. Therefore, what remains to be done is the determination of liability in damages and its assessment, if any, against the defendants since each of the defendants had made a concession not to contest the plaintiff's claim should the questions be answered in the plaintiff's favour ... However, we would like to emphasise here that our decision on these appeals will not be influenced by the concessions made. On the other hand, if the answer to the first question is against the plaintiff, the subsequent two questions will suffer the same fate and consequently, its action is doomed to fail because without the said right it had nothing to vest in the 1st defendant and hence, is not entitled to the payments under the principal agreement. Therefore, the determination of the threshold issue as preliminary issues will be decisive of the whole litigation or essentially the main part of the suit. Thus, resulting in a substantial saving of time and cost as it will significantly cut down the costs and time involved in pre-trial preparation or in connection with the trial proper.

[38] The plaintiff's contention with regard to its rights over petroleum won and saved in the continental shelf off its coast in this case is based on the Kelantan Petroleum Agreement and the Kelantan Grant which were entered into between the plaintiff and

Petronas pursuant to the provisions of the PDA. Clearly, this issue is a question of law which can be resolved by reference and interpretation of the relevant legislations and contractual documentations without having to go for a full trial of the action. It is trite that where the question of construction is a dominant feature of a case, the court should proceed to determine that issue. It follows that the whole case does not have to be disposed of but it is sufficient if substantial matters can be disposed of (see *Korso Finance Establishment Anstalt v. John Wedge* (Unreported), 15 Feb 1994, CA Transcript No. 14/387). Further, we also find that the pleadings have made reference to various legislations which in our view, are comprehensive and sufficient for the determination of the legal questions involved in this case, to the exclusion of the oral evidence of witnesses.

[39] With regard to the plaintiff's contentions that it was entitled to call evidence on the aims and *genesis* of the Kelantan Petroleum Agreement and the Kelantan Grant, the objects of the PDA and the need for review of the policy and intent behind the statute, we do not think so. The construction of these agreements does not require the testimony of witnesses as the terms of the agreements are a mandatory reflection of the statutory provisions of the PDA and therefore effect must be given to such provisions. In any case, the relevant background leading to the execution of the agreements have already been set out in the pleadings, hence there is no necessity to call for evidence. The doctrine and principle governing the interpretation and construction of statutes and documents are well established and settled. The authorities on such doctrine and principle have been discussed and clearly explained in great length in the judgment of the Court of Appeal in the *Terengganu* case, to which we fully agree and we do not think that there is a necessity for further elaboration here.

[40] In the end, our main concern here is on the exercise of the discretion of the learned High Court judge in making the order that the action to be proceeded by way of O. 14A, as later affirmed by the Court of Appeal. The issue for our consideration is therefore whether the High Court and the Court of Appeal decided the matter correctly and in accordance with the principles on such an exercise. As demonstrated in the judgment of the learned judge of the High Court, she had considered the material facts available before her as disclosed in the pleadings. The learned judge also noted the similarities of the arguments raised before her

with that of the *Terengganu* case in a similar application for O. 14A and had referred to and relied substantially on the reasoning made by the Court of Appeal in that case. In doing so, the learned judge had earlier made a comparison as to the material facts in the action before her with that of the *Terengganu* action and had correctly identified certain differences in the application of facts between the two before concluding that this is a fit and proper case to be determined under O. 14A. The decision of the learned judge of the High Court was affirmed by the Court of Appeal, which chose not to interfere with the exercise of discretion by the learned judge. From our reading of the judgment of the learned judge of the High Court, we find no error or misdirection whether in the application of principle or in law on the part of the learned judge and as such, we see no reason or justification requiring our interference now. We therefore answer the second question posed to us in the negative.

First Appeal – Discovery Issue

[41] We will now deal with the first appeal, that is on the discovery issue.

[42] Learned counsel for the plaintiff referred us to O. 24 rr. 1(1) and 2(1) of the Rules of the High Court 1980 and argued that there shall be mandatory discovery between parties in this suit. He argued that the plaintiff has been very specific in requesting for disclosure, as stated in its notice to produce documents dated 10 February 2011 and has given details of the document required to be produced with reference to specific paragraphs of the pleadings filed in the suit. He further argued that the documents requested are not only relevant to determine the issue of liability owed by Petronas, but also to determine the quantum of arrears and future payments payable by Petronas to the plaintiff. In this regard, the plaintiff also submitted that the O. 14A applications should only be determined after the parties to the suit have completed discovery of documents so that all relevant evidence is before the court before the suitability or merits of the O. 14A applications may be determined.

[43] The learned judge of the High Court in dismissing the plaintiff's discovery application had relied on O. 24 rr. 4 and 8 of the Rules of the High Court 1980. The learned judge was of the view that the determination on the issue of liability should be

proceeded first as such determination would save a lot of judicial time considering the nature and extent of the discovery sought by the plaintiff before concluding that the discovery was not necessary at that stage of proceedings. In this regard, learned counsel for the plaintiff submitted that in a suit where a heavy commercial and constitutional dispute involved such as this, reference to voluminous documents and interpretation thereof is necessary and that the volume of documents, time and cost to be incurred in preparing the documents are not relevant factors in a discovery application so long as the documents are relevant to the issues in dispute. In support of his contention, learned counsel for the plaintiff cited *Faber Merlin Malaysia Bhd v. Ban Guan Sdn Bhd* [1980] 1 LNS 189; [1981] 1 MLJ 105.

[44] With regard to discovery, O. 24 r. 4(1) of the Rules of the High Court 1980 (now O. 24 r. 4 of the Rules of Court 2012) empowers the court to make an order that any issue or question in a cause or matter to be determined first before any discovery of documents is made by the parties. This is so because if discovery is resisted on the ground that the documents or particular documents are not relevant to the issue or question in the cause or matter, the determination of such issue has essentially to take place first before deciding on whether or not to order for discovery. Other instances are where the issue of illegality arises, the court may order that the said question be determined first; or similarly, if the defence is limitation, the court may determine the issue of limitation first before ordering discovery. In these circumstances, it is possible that the action may stand or fall on the determination of the threshold issue or question itself. Further, O. 24 r. 8 also gives the court discretionary power to dismiss or adjourn discovery if it is found that it is not necessary, or not necessary at that stage or to the cause or matter.

[45] As discussed in the earlier part of our judgment, the core issue in this case is whether the plaintiff has any rights over petroleum won and saved in the continental shelf off its coast. Having perused the plaintiff's notice to produce documents dated 10 February 2011, we are of the view that the documents to which the plaintiff's application for discovery relates are not relevant to the core issue in this case. In fact, the documents

A sought for by the plaintiff are very extensive. Among the documents sought to be produced in the said notice were the agreements and the grants entered into and executed between Petronas and twelve state governments, all documents containing information pertaining to the areas/blocks of petroleum won and
B obtained offshore Kelantan from its very first discovery, all documents showing the location of Kelantan's petroleum production areas, including but not limited to their distance from Kelantan's shore, all production sharing contracts and other agreements executed between Petronas and contractors in respect
C of Kelantan's petroleum production areas, all documents in respect of the agreements, production and payments between Malaysia and Thailand relating to Malaysia-Thailand Joint Authority and accounts showing royalty payments made by Petronas to the Federal Government in respect of Kelantan, Sabah, Sarawak and
D Terengganu in respect of the respective states' petroleum production areas from the date of first payment.

[46] Learned counsel for Petronas contended that the documents sought by the plaintiff in the discovery application all relate to the
E issue of quantum of damages and they go nowhere towards establishing the issue of liability in this case. With that, we agree.

[47] In our considered view, these documents do not relate and would not throw any light towards establishing or deciding the
F core issue in question. In view of the O. 14A application in this case, the learned trial judge of the High Court was right in holding that discovery is not necessary at this stage of the proceedings. In holding so, the learned judge had identified the core issue in the O. 14A application and found that the documents sought for
G by the plaintiff are not relevant in determining the said issue and gave her reasons in finding so, more so if the O. 14A application was decided against the plaintiff. In our view, the learned judge's decision in dismissing discovery at that stage of proceedings is in line with the underlying principle under O. 24 r. 4 which
H underscores that the discovery process is predicated on the issues involved in a particular case and therefore, in this case, the determination of the core issue in the O. 14A application ought to, and had rightly been decided to precede the discovery.

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[48] That decision of the learned judge was affirmed by the Court of Appeal, to which we say, is a correct one. We find that the exercise of discretion by the learned judge in the matter was in accordance with principle which does not justify our interference.

[49] We therefore answer the first question in the first appeal in the negative and the second question in the affirmative.

[50] For these reasons, all the three appeals are dismissed with costs.